* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RFA(OS) 72/2007 & FAO(OS) 412/2007

% **Date of decision : 1st November, 2007**

\+ **1. RFA(OS) No. 72/2007**

KULBIR SINGH ..... Appellant
Through:In person.

versus

SUKHBIR SINGH & ORS. ..... Respondents
Through:Mr. Daljit Singh, Sr. Advocate with
Mr. C.M. Oberoi, Mr. N.S. Bajwa and
Mr. K.P. Mavi, Advocates.

AND

\+ **2. FAO(OS) No.412/2007**

KULBIR SINGH ..... Appellant
Through:In person.

versus

SUKHBIR SINGH & ORS ..... Respondents
Through:Mr. Daljit Singh, Sr. Advocate with
Mr. C.M. Oberoi, Mr. N.S. Bajwa and
Mr. K.P. Mavi, Advocates.

1. Whether reporters of local papers may be allowed to see the Judgment ?YES
2. To be referred to the Reporter or not? YES
3. Whether the Judgment should be reported in the Digest?YES

Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

DR. MUKUNDAKAM SHARMA, CJ : (oral)

These two matters being inter-connected, we propose to dispose of both these appeals by this common order.

RFA(OS) No. 72/2007

1. We have heard the appellant, who appears in person and the the learned counsel for the respondent on this appeal.

2. This appeal is directed against the order dated 14th December, 2006 passing a preliminary decree of partition in respect of the property No.A-1/8, Safdarjung Enclave, New Delhi (hereinafter referred to as the property). The appellant and the respondents are brothers and sisters being children of late Shri Girdhara Singh and late Smt. Piar Kaur. Shri Girdhara Singh expired in 1976 and Smt.Piar Kaur expired in the year 1985. It is an admitted fact that the property was owned by late Shri Girdhara Singh and the appellant and the respondents No.1,2 and 3 are each entitled to 1/4th share in the property.

3. Our attention has been drawn to paragraph 6 of the plaint and reply of the appellant to paragraph 6 of the said un-amended plaint. In paragraph 6 of the written statement of the appellant, the appellant admitted that he and respondents No.1,2 and 3

herein are owners to the extent of ¼ undivided share in the property.

4. In view of the above admitted position, the learned Judge has passed a preliminary decree for partition dated 14th December, 2006 holding that the appellant and the respondents No.1,2 and 3 are entitled to ¼ share in the property.

5. The appellant does not dispute the above position that each of the parties have ¼ share in the property and accepts the said position. He, however, submits that the respondents No.1 to 3, who are the plaintiffs, were wrongly allowed to amend the plaint and withdraw reliefs 'C' and 'D' in respect of movable assets left behind by late Shri Girdhara Singh and late Smt.Piar Kaur. This aspect has been examined by the learned Single Judge while disposing of IA No.13926/2006 vide same order dated 14th December, 2006. It is also stated by the appellant that the preliminary decree of partition could not have been passed in respect of the property, leaving out other properties which were left behind by late Shri Girdhara Singh and late Smt.Piar Kaur.

6. As far as withdrawal of prayers 'C' and 'D' are concerned, the said prayer was allowed by the learned Single Judge vide order dated 8th November, 2006. The appellant, who appears in person,

had filed FAO(OS) No.399/2007 which was dismissed by us on 12th October, 2007 holding, inter alia, that the plaintiffs had right to withdraw the reliefs made by them in the plaint. The learned Single Judge in the order dated 14th December, 2006, while disposing of the IA No.13926/2006, has rightly stated that the plaintiffs No.1,2 and 3 could always abandon their claim to the extent of their share in the movable property. To this extent, the appellant cannot again raise the issue decided by FAO(OS) No.399/2007. We may also refer here to the provisions of Order XXIII Rule 1 of the Code of Civil Procedure, 1908. Under the said provision, after institution of a suit, the plaintiff can abandon entire or part of his claim. The plaintiffs/respondents No.1,2 and 3 herein, therefore, could always give up their claim for partition in respect of movable properties and pray for decree of partition of the immovable property on which there is no dispute. Effect thereof is that the plaintiffs / respondents No.1,2 and 3 have given up and abandoned their claim in respect of a portion of their share. The learned Single Judge has specifically recorded in the order dated 14th December, 2006 that the appellant has liberty to take steps in accordance with law in respect of any claim he may have in respect of the movable property.

7. In view of the admitted position with regard to the immovable property that each of the parties own ¼ share in the same, we do not find any merit in the present appeal challenging passing of the preliminary decree of partition.

8. It may be relevant to state here that the appellant is defendant in the suit and his brother and two sisters, the respondents 1 to 3 herein, are the plaintiffs, who have prayed for decree of partition. Order for decree of partition has been passed in view of admitted position in the pleadings in form of averments made in the plaint and the written statement filed by the appellant herein.

9. The appeal is accordingly dismissed holding that the preliminary decree for partition was rightly passed in view of admission made by the appellant in the written statement.

FAO(OS) No.412/2007

1. After passing the preliminary decree of partition dated 14th December, 2006, the learned Single Judge had appointed a Local Commissioner to conduct inspection of the property and submit a report whether the property can be partitioned in four shares and to suggest mode of partition, if the same is possible. The Local Commissioner submitted his report after inspecting the property.

The Local Commissioner also took help of a Government approved valuer and Architect and came to the conclusion that the property cannot be sub-divided into four equal shares by physical partition by metes and bounds. It was observed that any attempt to partition the property by metes and bounds would render the entire building useless and would adversely affect its market value. The Local Commissioner recommended that the property should be sold and the sale proceeds should be equally divided amongst the plaintiffs/respondents 1 to 3 and the sole defendant/appellant.

2. The report has been accepted by the learned Single Judge, who has directed that the property in question be put to sale. At the first stage, the matter has been listed for inter se bidding between the parties.

3. The appellant is aggrieved by the said order of sale as according to him even if the property cannot be divided by metes and bounds, the appellant would be satisfied with the one part of the property as given to him. The learned Single Judge had also considered the said prayer which was earlier made before the learned Single Judge. The learned Single Judge has specifically recorded that he had asked the defendant as to what partition/share of the property he would like to have. Appellant

submitted that the first floor should be allotted to him and the rest of the property could be given to the plaintiffs-respondents.

4. The learned Single Judge considered the said suggestion given by the appellant defendant and found that in that event the plaintiffs would be packed into the ground floor and one room in the terrace while the defendant would enjoy the benefits of the entire first floor. The aforesaid suggestion did not find favour. The learned Single Judge has referred to the site plan of the property consisting of ground floor, partially constructed first floor and the terrace. The first floor consists of one room, one kitchen, drawing room, dining room and one store, whereas the ground floor consists of three rooms, three toilets, one kitchen and a drawing and dining hall. On the terrace, there is only one room, one toilet and one store. After examining the site plan, the learned Single Judge came to the conclusion that the property cannot be physically divided by metes and bounds into four separate shares. Reasons for rejecting the prayer of the defendant are found to be cogent and reasonable. The defendant cannot claim share in the property more than his entitlement. It is also clear from the records that the property cannot be divided by metes and bounds and, therefore, there is no other alternate but to order for sale of

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the property. We hold that the objections of the defendant ~~was~~ were N. rightly rejected by the learned Single Judge in view of the facts and circumstances of the case. There is no merit in this appeal which is dismissed.

CHIEF JUSTICE

SANJIV KHANNA, J

November 01, 2007
Rohtash/nm